

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

WILLIAM DUKE, :
Plaintiff : **CIVIL ACTION NO. 3:16-2061**
v. : **JUDGE MANNION**
NANCY A. BERRYHILL¹, :
Defendant :

ORDER

Pending before the court is the report of Magistrate Judge Susan E. Schwab, which recommends that the decision of the Commissioner be vacated and the instant matter remanded to the Commissioner pursuant to sentence four of 42 U.S.C. §405(g) to conduct a new administrative hearing.

¹On January 23, 2017, Nancy A. Berryhill became the Acting Commissioner of Social Security. On March 6, 2018, the Government Accountability Office stated that, as of November 17, 2017, Ms. Berryhill's status violated the Federal Vacancies Reform Act, which limits the time a position can be filled by an acting official and "[t]herefore Ms. Berryhill was not authorized to continue serving using the title of Acting Commissioner..." Violation of the Time Limit Imposed by the Federal Vacancies Reform Act of 1988 Commissioner, Social Security Administration. Government Accountability Office. March 6, 2018. However, Ms. Berryhill continues to functionally lead the Social Security Administration from her position of record as Deputy Commissioner of Operations. Pursuant to Federal Rule of Civil Procedure 25(d), Nancy A. Berryhill is substituted for Carolyn W. Colvin, Acting Commissioner of Social Security, as the defendant in this suit.

(Doc. 14). By letter filed on May 30, 2018, the Commissioner waived the opportunity to object to Judge Schwab's report and recommendation. (Doc. 15). The plaintiff has also filed no objections to Judge Schwab's report and recommendation.

When no objection is made to a report and recommendation, the court should, as a matter of good practice, "satisfy itself that there is no clear error on the face of the record in order to accept the recommendation." Fed. R. Civ. P. 72(b), advisory committee notes; see also Univac Dental Co. v. Dentsply Intern., Inc., 702 F.Supp.2d 465, 469 (M.D.Pa. 2010) (citing Henderson v. Carlson, 812 F.2d 874, 878 (3d Cir. 1987) (explaining judges should give some review to every report and recommendation)). Nevertheless, whether timely objections are made or not, the district court may accept, not accept, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. 28 U.S.C. §636(b)(1); Local Rule 72.31.

In his appeal, the plaintiff argues that the administrative law judge ("ALJ") failed to properly assess the effects of his obesity on his other impairments; the ALJ's finding that the plaintiff can perform light work activity is not supported by substantial evidence; and the ALJ's residual functional

capacity assessment is not supported by a medical source opinion.

In carefully considering the plaintiff's claims, Judge Schwab found that substantial evidence does not support the ALJ's residual functional capacity assessment and that a more meaningful assessment of the effect of the plaintiff's obesity on his ability to work in combination with his other impairments is warranted. Accordingly, Judge Schwab recommends that the decision of the Commissioner be vacated and the matter be remanded for a new administrative hearing.

The court has reviewed the entire report of Judge Schwab and finds no clear error of record. The court further agrees with the sound reasoning which led Judge Schwab to her recommendation. As such, the court adopts the reasoning of Judge Schwab as the opinion of the court.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

- (1) The report and recommendation of Judge Schwab, (Doc. 14), is **ADOPTED IN ITS ENTIRETY**.**
- (2) The decision of the Commissioner is **VACATED** and the matter **REMANDED** to the Commissioner for a new administrative hearing.**

(3) The Clerk of Court is directed to **CLOSE THIS CASE.**

s/ *Malachy E. Mannion*
MALACHY E. MANNION
United States District Judge

Date: July 16, 2018

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